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No. 03-659

December 17, 2003

In The

# Supreme Court of the United States

MELVIN T. YAMAMOTO, ELAINE S. YAMAMOTO, and MAXINE H. TAMPON,

*Petitioners,*

vs.

BANK OF NEW YORK, BNC MORTGAGE, INC., and U.S. FINANCIAL MORTGAGE CORPORATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Even assuming that grounds for TILA rescission otherwise existed, whether it was proper for the district court to dismiss the TILA complaint in light of: (1) debtors' admitted inability to tender the proceeds, and (2) debtors' subsequent failure to make any effort to tender the proceeds or to seek additional time to tender the proceeds after being given sixty (60) days to do so by the court.

## CORPORATE DISCLOSURE STATEMENT

Respondent The Bank of New York is a non-governmental corporate party, incorporated in the State of New York. No individual or public company owns ten percent or more of stock of the company.

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## REASONS FOR DENYING THE PETITION

### I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The premise of the pending Petition for Writ of Certiorari (the "Petition") is that debtors should be able to avoid summary dismissal of their Truth-in-Lending Act ("TILA", 15 U.S.C. §1601, et seq.) lawsuit, even having admitted their inability to tender the amount of proceeds estimated to be necessary to effect rescission under the TILA, on the basis that the court did not make a definitive ruling that rescission would otherwise be warranted under their factual allegations. The premise is not supported by the law and the Petition should be denied.

The facts of this case show that: (1) on cross motions for summary judgment, hearing a potential justification for rescission, but also the admissions of the debtors' inability to tender the estimated funds, the court denied both cross motions as to the rescission claim, and provided debtors a designated period of time in which to make the tender – warning that failure to do so would result in dismissal, (2) the court's ruling denying the summary judgment was based on an "assumption that the disclosure . . . entitle[d] debtors to rescission," and (3) having been instructed by the court to tender the funds within that certain period of time, the debtors failed either to ask for additional time to make the tender or to make any showing of any effort to attempt to make the tender; the court then entered the dismissal.

The Petition, however, misconstrues the rulings below, ignoring and omitting from the Petition any of the language from the opinions (both district and Ninth Circuit),

which demonstrate that at each juncture, the court took into account the presumption that there had been TILA violations which would have justified rescission. In addition, the Petition relies on an erroneous inference that the debtor(s) had no knowledge of the amount necessary for the tender. Further, the Ninth Circuit ruling does not demonstrate any split among the circuits. Those misrepresentations of the record and the law should preclude granting of the instant Petition.

TILA provides that when a consumer borrows funds secured by their principal dwelling (except for the acquisition or construction thereof), they automatically have a period of three business days in which to rescind the transaction. 15 U.S.C. §1635(a). The concept at that juncture is simple, as the lender does not finance the transaction until those three days have lapsed (Reg. Z, 12 C.F.R. §226.23(c)), so the common law concept of rescission – to unmake the contract and return the contracting parties to their status quo – is relatively easily attained.

In further protecting the consumer and punishing the lender, TILA includes a provision that if the notice of the right to rescind, or the material disclosures, are not properly provided to the consumer, then the three day period for rescinding the transaction may extend to three years. Reg. Z, 12 C.F.R. §226.23(a)(3). At that point, in a valid case upon proper notice and demand from the debtor, the lender's security interest is to be voided, but the consumer must tender the principal sum then due, less interest payments and finance charges. 15 U.S.C. §1635(b), 15 U.S.C. §1605(a); see *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 705 (9th Cir. 1986). Thus, a consumer who successfully brings

a TILA lawsuit well into the third year of a qualified transaction may find a windfall.

In the instant case, about 18 months into the loan obligation, the debtors[1] demanded rescission on the sole basis that they had not received the requisite completed Notice of Right to Cancel forms. The creditor, in writing, disputed the allegation and denied the rescission demand; the debtors, represented by counsel, then filed the TILA action below.

As a result of discovery, debtors alleged they had an additional basis on which to seek rescission. However, also in the discovery phase of the litigation, during the course of the debtors' depositions they admitted their inability to tender the estimated principal sum due, even after subtracting finance charges and interest paid.

At the district court hearing on cross-motions for summary judgment, Petitioner argued that she had a right to rescind the subject loan on the basis that an appraisal fee was erroneously overcharged. Rather than forcing the lender to immediately cancel its security interest in the subject property, the court listened to testimony concerning the consumer's obligation and ability – or inability – to tender sums due to the creditor under the relevant rescission formula. The testimony included a discussion of the amount required for rescission, which was estimated to be about $150,000.00. The court, even "assuming that debtors were entitled to rescission," denied the cross-motions for

[1] The underlying lawsuit was brought by three persons – two of which were dismissed on separate grounds not relevant to the instant petition. There is, therefore, only one petitioner.

summary disposition of the rescission claim, and instead ordered the petitioner to tender the loan proceeds within 60 days, warning that failure to comply would result in the dismissal of the rescission claim. When the petitioner failed to either demonstrate any effort to tender, or request any additional time in which to tender, and indeed, simply failed to tender, the district court dismissed the case.

The Ninth Circuit Court of Appeals affirmed, stating:

> As rescission under §1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what.

*Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir. 2003) (emphasis in original). This language was preceded in the Ninth Circuit opinion by citation to the congressional intent as to the TILA regulations, which is likewise quoted, as follows:

> [T]he courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act.

*Id.*, quoting S.Rep. No. 368, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 265.

The Petition avoids or misrepresents those facts as to the courts' positions as to any right to rescission, or the debtors' knowledge of the estimated tender amount.

The Petition construes its argument largely on a partial quotation of the above-quoted language from the Ninth Circuit – specifically, the petition deletes the language which makes the assumption that grounds for rescission exist. After deleting the language which makes the assumption that grounds for rescission exists, the Petition then construes the above-quoted language from the Ninth Circuit to be a premature denial of a substantive right to rescission.

The petition then relies on an inference that debtor had no knowledge of the amount necessary for tender. The inference is not accurate, as although there was no actual calculation made during the course of the proceedings, the district court did receive uncontested testimony that the rescission calculation would be in the range of approximately $150,000.00, less reasonable attorneys' fees, and that the debtors had admitted an inability to be able to raise even $20,000.00. The Ninth Circuit correctly stated the record, that no objection "was ever made about the amount required to be tendered." 329 F.3d at 1170-1171, n.3.

This is not a case where the lack of a specific amount due precluded the debtor(s) from seeking financing for their TILA rescission demand. Rather, they provided no evidence of any effort or ability to obtain any financing or funding in any way. On those facts, the record does not support the question presented in the Petition.

## II. THE PROCEEDINGS IN THIS CASE ARE NOT REPRESENTATIVE OF ANY INCONSISTENCY IN THE NINTH CIRCUIT, NOR DOES IT REPRESENT A SPLIT IN THE CIRCUITS CONCERNING CONDITIONING OF THE TILA PROCESS

The Petition seeks the time and attention of this Court to address a purported split between the Ninth Circuit and all other Circuits, as well as Petitioner's perception of an inconsistency within the Ninth Circuit's precedence. Petitioner contends that "no federal court in any other circuit has required borrowers to tender first before adjudicating the validity of rescission claims." (Petition at 7.) The underlying contention of the Petition, as shown above, misrepresents the position of either the District or the Ninth Circuit Courts in their rulings. In both instances, the courts presumed that rescission would have been warranted. The next step taken by the District Court, and affirmed by the Ninth Circuit, was to condition any order of rescission on the debtor's tender of the remaining principal due under the TILA formula.

What Petitioner seeks is her purported "self-enforcing mechanism" – which, were the court to enter an order adjudicating the rescission claim to be valid, would presumably result in automatically voiding the security interest, without any payment to the creditor. That result, as recently noted by a bankruptcy judge in the Eastern District of Pennsylvania, is contrary to the rulings in the circuit courts. In a substantial opinion which included analysis of the issue of whether rescission should be conditioned upon tender by the debtor, along with a survey of the current position of the federal bench on the issue, the court stated that:

> [The] argument [that rescission should be conditioned upon Debtor's tender] is supported by the clear majority of circuit courts that have addressed the issue. See *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140-42 (11th Cir. 1992); *Federal Deposit Insurance Corporation v. Hughes Development Company*, 938 F.2d 889, 890 (8th Cir. 1991); *Brown v. National Permanent Savings and Loan Association*, 683 F.2d 444 (D.C. Cir. 1982); *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980); *Powers v. Sims and Levin (In re Powers)*, 542 F.2d 1216, 1221-22 (4th Cir. 1976); *LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir. 1976).

*In re Williams*, 291 B.R. 636, 655-656 (E.D. Pa 2003).[2] The opinion cites the Fifth Circuit as holding otherwise, citing both *Gerasta v. Hibernia National Bank*, 575 F.2d 580, 584-85 (5th Cir. 1978), and *Harris v. Tower of Loan of Mississippi, Inc.*, 609 F.2d 120, 123 (5th Cir. 1980). *Williams*, 291 B.R. at 656. However, as explained by the Eleventh Circuit, both of these Fifth Circuit cases preceded the enactment of the Simplification and Reform Act, Pub.L.No. 96-221, tit. VI, §612(a)(4), 94 Stat. 168, 175 (1980) (codified as amended at 15 U.S.C. §1635(b)). *Homestake*, 968 F.2d at 1140. The last sentence of that codification states:

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[2] Interestingly, regardless of the weight of all of the circuit courts otherwise, the bankruptcy judge in the *Williams* case ultimately relied on the difference between non-bankruptcy settings as opposed to the bankruptcy context with "altered rights and remedies," and decided to void the mortgage without conditioning rescission on the tender. 291 B.R. at 661. Notably, however, the total amount financed was less than $20,000.00. 291 B.R. at 641.

> The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

15 U.S.C. §1635(b). Thus, as the *Homestake* court correctly points out, any perceived disagreement in the Fifth Circuit is not supported, as the federal statute essentially superceded the *Gerasta* and *Harris* holdings.

The *Williams* survey of the federal courts states that although the Third Circuit has not spoken on the issue, a bankruptcy court sitting in that circuit has conditioned rescission on the tender, in *Apaydin v. Citibank Federal Savings Bank (In re Apaydin)*, 201 B.R. 716, 723-24 (Bankr. E.D. Pa. 1996). As to the Tenth Circuit, the *Williams* opinion notes only that a bankruptcy court within the Tenth Circuit which had refused to condition rescission was reversed by the district court in *Quenzer v. Advanta Mortgage Corporation, USA*, 288 B.R. 884, 886-89 (D.Kan. 2003). Interestingly, the *Quenzer* court relied on *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976), as significant authority for altering the statutory scheme of TILA because rescission is an equitable remedy. *Rachbach*, of course, predated the Simplification and Reform Act, but nonetheless supported altering the TILA statutory scheme.

Finally, in its preamble to distinguishing bankruptcy proceedings from the mainstream circuit court cases on TILA rescission, the opinion in *Williams* cites *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 706 n.15 (9th Cir. 1986), as demonstration that the Ninth Circuit supports the authority of the district courts to alter the procedures in applying the TILA provisions of 15 U.S.C. §1635(b). 291 B.R. at 656 n.24. This perception squares directly with the Ninth Circuit holding which

Petitioner seeks to overturn.[3] More specifically, rather than being an automatic, self-enforcing mechanism, the federal courts, including the Ninth Circuit, have held that the mechanics of rescission call for the court to use its discretion in effecting the rights of the parties – including "conditioning the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received." *Palmer v. Wilson*, 502 F.2d 860, 862 (9th Cir. 1974).

Since the *Williams* analysis, dated in April 2003, listing the position of the circuits which have spoken on the issue, an additional bankruptcy case within the Tenth Circuit also supports the conditional rescission, *In re Webster*, 300 B.R. 787 (2003), and a district court in the Seventh Circuit has spoken on the issue, indicating its willingness to enter a court order modifying the provisions as to the order of performance in a TILA rescission. *Velazquez v. Homeamerican Credit, Inc.*, 254 F.Supp.2d 1043, 1047 (N.D. Ill. 2003) (interestingly noting concern for the potential situation where the consumer might give the creditor an indication that she could not tender the money after the creditor performed).

Thus, with the exception of some aberration of cases within the bankruptcy context, which does not include the instant matter, there is no split in the circuits for this court to address, and the Ninth Circuit has retained its

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[3] Petitioner's citation to *Dinsmore-Thomas v. FDIC*, 1998 U.S. App. LEXIS 12777 (9th Cir. Feb. 19, 1998), is a blatant violation of Ninth Circuit Rule 36-3, as it is an unpublished opinion, which may be cited only in specific circumstances, none of which apply herein.

consistency. On that basis, the dismissal, affirmed by the Ninth Circuit Court of Appeals, was correct.

## CONCLUSION

For the foregoing reasons, Respondent Bank of New York respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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